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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

RESPONDENT'S PETITION FOR REHEARING.

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No. 125.

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ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

RESPONDENT'S PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

Now comes Illinois Terminal Railroad Company, Respondent herein, and, pursuant to Rule 58, paragraph 1, of the Rules of this Court, files this, its Petition for Rehearing, urging the following grounds:

1. The Per Curiam judgment of reversal, entered February 14, 1955, deprives Respondent railroad of a trial by

jury according to the rules of the common law, is contrary to Section 2106 of 28 U. S. C., violates Section 5 of Article II of the Illinois Constitution of 1870 and violates the Seventh Amendment to the Constitution of the United States, if this Court is holding that such Seventh Amendment applies to and controls this cause.

2. The Writ of Certiorari herein is improperly addressed to the Illinois Supreme Court and should be dismissed for lack of jurisdiction.

3. This cause does not present a substantial Federal question which invokes the jurisdiction of this Court (Corcoran v. City of Chicago, 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed. 473).

4. The Illinois Appellate Court had the power to remand this cause for a new trial before another jury under the settled Illinois law governing this cause (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961).

All of these points were urged and argued in Respondent's Brief on Merits. The Per Curiam judgment of this Court deciding this "new trial" cause solely on the authority of **Lavender v. Kurn**, 327 U. S. 645, a "demurrer to the evidence" case (See: Lavender v. Kurn, 354 Mo. 196, 189 S. W. 2d 253), decided at **the October term, 1945,** shows that this Court has overlooked or misapprehended every point urged by Respondent in its Brief on Merits, has decided this cause solely by applying **Federal** "directed verdict" law and has overlooked Section 2106 of 28 U. S. C., **enacted in 1948**, which provides as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and **may remand the cause** and direct the entry of such appropriate judgment, decree, or order, **or require such**

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further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963." (Emphasis supplied.)

and clearly authorizes Federal Appellate Courts to remand causes for new trial.

For these reasons Respondent will again attempt to point out that (I) the writ of certiorari herein is addressed to the wrong court and should be dismissed for lack of jurisdiction; and that (II) even under **Federal** law the Illinois Appellate Court had the power to remand this cause for a new trial **before another jury.**

In confining this Petition for Rehearing to such two points Respondent does not waive or abandon the two principles of law that actually control this cause under prior decisions of this Court, i. e.:

(a) That this cause does not present a substantial Federal question which invokes the jurisdiction of this Court (Corcoran v. City of Chicago, 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed. 473—Respondent's Brief on Merits 22-25).

(b) That this cause presents only a matter of Illinois procedure governed entirely by Illinois law (Minneapolis v. St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961 —Respondent's Brief on Merits 38-45).

Because a correct determination of the real issues presented in the case at bar is of great importance to the Illinois Appellate Court that heard this cause, to the other state appellate courts that review F. E. L. A. and like Federal Act cases and to the Bench and Bar of this Country, Respondent respectfully requests this Court to permit it to make a somewhat extended discussion of Points I and II, supra. A discussion also proper because this Court has overlooked or misapprehended Respondent's entire argument in its Brief on Merits.

I.

The Writ of Certiorari Herein Was Improperly Issued to the Illinois Supreme Court and Should Be Dismissed for Lack of Jurisdiction.

The court either has misapprehended our point on lack of jurisdiction, or totally ignored our argument pertaining thereto which appears on pages 24, 26, 27 and 28 in Respondent's Brief on Merits.

That the Court has overlooked this vital point was made more apparent on oral argument when Justice Frankfurter in questioning counsel for Petitioner stated that the Court had the right to find the record wherever it may be physically lodged. The question presented here is not the right or ability of this Court to find and obtain the record once the Court has jurisdiction, but is rather the complete failure of jurisdiction in this Court, because the Illinois Supreme Court, to which the writ is directed, is not the Court in which final judgment was rendered by the highest court of a state in which a decision could be had.

It is not a question of where the record is, it being conceded that if the court has jurisdiction it could have a proper record brought to it wherever it could find it to determine questions that the court might deem proper in reviewing F. E. L. A. litigation.

This court obtains its jurisdiction under Section 28, U. S. C., Section 1257, and its jurisdiction to issue a writ of certiorari is limited to "**final judgment or decrees rendered by the highest court of a State in which a decision could be had.**"

It is admitted that the Appellate Court for the Fourth District of Illinois was the court which rendered the final judgment in this matter, which judgment was rendered under the procedural rules of Illinois. From this judgment of the Appellate Court Petitioner filed a Petition for

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Leave to Appeal to the Illinois Supreme Court, **which was denied** (Record 69).

The only portion of the record that is necessary to have this court determine the jurisdictional question is the denial of the petition for leave to appeal by the Illinois Supreme Court. This is shown at page 69 of the record.

Petitioner in his Reply Brief devoted pages 6 to 18 in discussing this jurisdictional question. On page 13 of Petitioner's Reply Brief he stated the following:

> "Where the Supreme Court of Illinois denied the Petition for Leave to Appeal, as it did in the instant case, the record and mandate of that Court, denying the petition, would have been returned to the Appellate Court for the Fourth District as a matter of course (as provided in Paragraph 259.32 of Chapter 110, Ill. Rev. Stat.) had not petitioner herein adopted a different procedure.
>
> "Had this situation occurred, then Respondent would have been correct in its contention that the writ should properly have issued to the Appellate Court for the Fourth District.
>
> "However, in the instant case, petitioner obviated this situation by also staying the mandate of the Supreme Court of Illinois until this petition for a writ of certiorari was determined by this Court."

It is submitted that under said Illinois Supreme Court Rule 32 (Ill. Rev. Stat. 1953, Ch. 110, Par. 259.32), the Supreme Court of the State of Illinois, on denying a Petition for Leave to Appeal, had no authority to stay any mandate, nor was any mandate required to send the case back to the Appellate Court. This rule specifically provides as follows:

> "(1) The party applying in the Supreme Court for Leave to Appeal from an Appellate Court shall file a petition therefor in the Supreme Court, stating therein

> the reasons and grounds of appeal. The clerk of the Supreme Court shall thereupon transmit a certificate of such filing to the clerk of the Appellate Court who shall transmit to the clerk of the Supreme Court the same record which was transmitted to the Appellate Court, with a certified copy of the record of the Appellate Court appended thereto. **In case the leave shall not be granted the record shall be returned forthwith to the clerk of the Appellate Court.**" (Emphasis supplied.)

And the only time that the Illinois Supreme Court could stay any mandate is under the situation where it would have granted the Petition for Leave to Appeal. The language pertaining to this procedure, under the rule, is as follows:

> "If the petition shall be granted, the case shall proceed as an appeal, and parties desiring to file briefs shall be governed by Rule 41 (3). **Wherever leave to appeal shall have been granted by the Supreme Court the issuing or enforcement of any mandate of the Appellate Court pursuant to its judgment**, or of any judgment entered in any Court or standing affirmed in any Court, pursuant to the mandate of the Appellate Court, shall be stayed without further order by the Supreme Court until the final disposition of the case by the Supreme Court, but the Supreme Court or a justice thereof in vacation may upon motion in any case otherwise provide or stay the mandate upon such terms as it or he shall fix." (Emphasis supplied.)

Thus it is specifically provided, under the rule above stated, that the Supreme Court of Illinois had no further jurisdiction in the matter when it denied the leave to appeal; that the judgment of the Appellate Court became final at the time of its rendition, and without any further action, by mandate or otherwise, by the Illinois Supreme Court; and that the judgment of the Appellate Court, by

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uch a ruling, was found by the Supreme Court of Illinois
be correct. **By this very action of the Supreme Court**
f Illinois, in denying leave to appeal, it divested itself of
ll jurisdiction in the matter.

In the case of **Soden v. Claney,** 269 Ill., page 98 (109 N.
. 661), the Court on page 101, 102 held:

"By section 121 of the Practice act the judgments or decrees of the Appellate Court are made final in all cases except those wherein appeals and writs of error are specifically required by the constitution to be allowed from the Appellate Courts to the Supreme Court, or in cases where certificates of importance are allowed by the Appellate Court, or in cases which the Supreme Court may require to be certified to it by certiorari or otherwise. **The denial by this court of a petition for certiorari** in a case not required by the constitution to be reviewed by this Court and where a certificate of importance has not been issued by the Appellate Court **makes the judgment of the Appellate Court in that case final.**" (Emphasis supplied.)

Section 121 of the former Illinois Practice Act, cited in the above case of **Soden v. Claney**, is now section 75 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1953, ch. 110, par. 199), and the pertinent part thereof is as follows:

"(1) Appeals shall be taken directly to the Supreme Court in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved, and in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires, and in all cases relating to revenue, or in which the State is interested as a party or otherwise.

"(2) In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals

are specifically required by the constitution of the State to be allowed from the Appellate Courts to the Supreme Courts, **the judgments or decrees of the Appellate Courts shall be final.**" (Emphasis supplied.)

Said section 75 of the Illinois Civil Practice Act, supra, was construed by the Illinois Supreme Court in the case of **Sales Corp. v. National Mineral Company,** 388 Ill. 281 (57 N. E. 888), the court on page 283 holding:

> "**In all cases in which its jurisdiction is invoked pursuant to law,** except those wherein appeals or writs of error are specifically allowed by the constitution, **the judgments of the Appellate Court are final,** subject to the granting of a leave to appeal by the Appellate Court, with a certificate of importance, **or by the discretionary allowance of an appeal by this court.** Ill. Rev. Stat., 1941, Chap. 110, par. 199, sec. 75." (Emphasis supplied.)

And in the Illinois Appellate Court in the case of **Little v. Chicago Woman's Bowling Ass'n, Inc.**, 344 Ill. App. 65 (99 N. E. 78), the court holding on page 71:

> "After consideration of the able arguments by respective counsel and the authorities cited, **we hold with the position taken by counterdefendants that 'final determination,' as employed in the statute, necessarily means the date the final judgment of the reviewing court becomes final, and not the expiration of the last day for filing petition for rehearing, or the entry of an order denying the petition if one is filed, or the date of entry of the order of the Supreme Court denying leave to appeal.** The authorities are substantially in agreement that the filing of a petition for rehearing **or for leave to appeal,** when accompanied by stay of mandate, merely stays the enforcement of the 'final determination' theretofore reached by the reviewing court by temporarily holding up the is-

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suance of the mandate; **the 'finality' of the prior determination of the reviewing court is not affected.** Dodd and Edmunds, Illinois Appellate Jurisdiction and Practice, sec. 1275."

And on pages 73 and 74 stated:

"In support of their contention that the decision of the Appellate Court was not final until the mandate became available, counterclaimants argue, inter alia, (1) that a delay in disposing of the petition for rehearing would preclude appeal to the Supreme Court; (2) that a longer delay would preclude a successful appellant from filing the mandate within the one year allowed by section 88 (3); and (3) that the mandate having been stayed pending the Supreme Court's determination of the petition for leave to appeal, a delay by that court of over one year in making that determination would preclude compliance with section 88 (3). **An answer to the first of these contentions is that the legislature has provided a different rule for determining finality in the case of an appeal from the Appellate Court to the Supreme Court** (Civil [Practice] Act, section 75, and Supreme Court Rule 32). As to the remaining suggestions, it should be stated that if such delays were to occur, the court would undoubtedly protect the appellant's right to file the mandate under section 88 (3) by vacating its earlier judgment and entering a new one, if requested to do so.

"In view of our conclusion that the Appellate Court's opinion and order of March 1, 1949, was 'the final determination' by the reviewing court within the meaning of section 88 (3) of the Civil Practice Act, the judgment of the superior court in refusing to permit further proceedings in the case because the mandate was not filed in time should be affirmed, and it is so ordered." (Emphasis supplied.)

For this reason the only "final judgment" that is in effect in this cause is that of the Illinois Appellate Court and, therefore, the Writ of Certiorari had to be and could only be issued to said Appellate Court.

There is no requirement under Illinois procedure that a mandate be issued from the Illinois Supreme Court to the Illinois Appellate Court to reinvest the Appellate Court with jurisdiction. Under the applicable rules and procedure, above set out, the Illinois Appellate Court never lost jurisdiction, its judgment was "final" and could only be affected if the Illinois Supreme Court exercised its discretion and **allowed** the appeal.

The question in this case is not where the record is physically lodged, or the right of this court to have the record produced wherever it might be, **but is one of jurisdiction of this court in the first instance.**

The fact that this court granted the writ of certiorari herein does not determine the exercise of jurisdiction, for the issuance of the writ is discretionary. See **Hammerstein v. Superior Court**, 341 U. S. 491, 492, 98 L. Ed. 1135-1137.

In the recent case of **Michigan-Wisconsin Pipe Line Co. v. Calvert**, 347 U. S. 157, 98 L. Ed. 583 (decided in 1953), **which opinion was written by Mr. Justice Clark of this court**, it was therein held in practically an identical situation that the Appellate Court was the court that the writ of certiorari should issue to for the reason **that it was in that court that the final judgment was rendered by the highest court of a state in which a decision could be had**, and two appeals from the Supreme Court of Texas were dismissed for lack of jurisdiction. The court, on pp. 159-160 of 341 U. S., p. 588 of 98 L. Ed., held:

> "By state statute and procedural rule, the docket notation 'refused' in denying application for writ of error signifies that the State Supreme Court deems the

judgment of the Court of Civil Appeals a correct one and the principles of law declared in the opinion correctly determined. Appellants were uncertain whether appeal to this Court was properly from the Court of Civil Appeals or the Supreme Court of Texas, as 'the highest court of a State in which a decision could be had' within the meaning of 28 U. S. C., Sec. 1257. Hence each appellant appealed from each of the courts. **We postponed to the hearing of the cases on the merits a determination of the jurisdictional question.** 346 U. S. 805, 98 L. ed. 335, 74 S. Ct. 119.

"**We think that appeals in these cases were properly from the Court of Civil Appeals.** In American R. Express Co. v. Levee, 263 U. S. 19, 68 L. ed. 140, 44 S. Ct. 11 (1923), the Supreme Court of Louisiana had refused a writ of certiorari to the State Court of Appeal 'for the reason that the judgment is correct.' Mr. Justice Holmes, speaking for a unanimous Court, said:

"'. . . **[U]nder the Constitution of the State the jurisdiction of the Supreme Court is discretionary . . . and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther, . . . when the jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had.** Another section of the article cited required the Supreme Court to give its reasons for refusing the writ, and therefore the fact that the reason happened to be an opinion upon the merits rather than some more technical consideration, did not take from the refusal its ostensible character of declining jurisdiction. Western Union Telegraph Co. v. Crovo, 220 U. S. 364, 366. Norfolk & Suburban Turnpike Co. v. Virginia, 225 U. S. 264, 269. Of course the limit of time for applying to this Court was from the date

when the writ of certiorari was refused.' 263 U. S., at 20, 21.

"In Lone Star Gas Co. v. Texas, 304 U. S. 224, 82 L. ed. 1304, 58 S. Ct. 883 (1938), with the present Texas procedural provisions in effect, this Court's mandate issued to the Court of Civil Appeals in a case where the State Supreme Court had 'refused' writ of error. See also United Gas Public Service Co. v. Texas, 301 U. S. 667, 81 L. ed. 1332, 57 S. Ct. 921 (1937).

"**Accordingly the appeals in Nos. 199 and 201, from the Supreme Court of Texas, are dismissed.** We proceed to consider Nos. 198 and 200." (Emphasis supplied.)

Mr. Justice Clark in his opinion in the **Michigan-Wisconsin Pipe Line Company v. Calvert case**, supra, followed the decision of this court in **Amr. Railway Express Company v. Levee**, 263 U. S. 20, 68 L. Ed. 140, the language from said opinion being quoted in the **Michigan-Wisconsin Pipe Line Company v. Calvert case**. This rule followed by Mr. Justice Clark in said case and by Mr. Justice Holmes in the case of **Amr. Railway Express Company v. Levee**, was firmly established in **Norfolk Turnpike Co. v. Virginia**, 225 U. S. 264, 56 L. ed. 1082, where this Court laid down the rule that it now follows, and which appears on page 269 of 225 U. S., and on page 1086 of 56 L. Ed., as follows:

"While, therefore, in this case, for the reasons stated, we entertain jurisdiction, and do not of our own motion dismiss the writ, for the purpose of avoiding the complexity and doubt which must continue to recur, and for the guidance of suitors in the future, we now state that from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a state, declining to allow a writ of error to or an appeal from a lower state court, un-

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> less it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the Crovo Case, and shall therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action."

In this latter case, this Court put to rest the question of jurisdiction, in the type of case now before this Court, and specifically laid down the rule of law that was followed by Mr. Justice Clark in stating that the writ can only issue to the court wherein **final judgment was rendered**. In this case the only court that a final judgment was rendered in was the Appellate Court for the Fourth District of Illinois.

What judgment was rendered in the Illinois Supreme Court wherein this court could find that it was a final judgment which it could review by a writ of certiorari? The only thing that the Illinois Supreme Court did was to deny a Petition for Leave to Appeal which, in effect, merely stated that the judgment of the Appellate Court was correct. Under the Illinois procedural rules the Illinois Supreme Court could not enter any final judgment and could not stay any mandate because there was nothing to stay. This is shown by the rules of the Illinois Supreme Court and State procedure which it was bound to follow. In view of its holding in the case of **Michigan-Wisconsin Pipe Line Co. v. Calvert**, supra, this court, without any question of a doubt, is without jurisdiction to entertain this proceeding.

Petitioner admits that the Appellate Court for the Fourth District was the correct court for the writ to issue

to, but states that by reason of the fact that the Illinois Supreme Court stayed its mandate that the writ was proper to the Illinois Supreme Court. Under the Illinois procedural law the Illinois Supreme Court, as above stated, had no authority to stay the Appellate Court judgment and any proceedings to secure a stay of mandate would necessarily have to be filed in the Appellate Court. Under the Illinois Supreme Court rules it provides that when leave to appeal was not granted the record shall be returned **forthwith to the clerk of the Appellate Court.** By the Illinois Supreme Court's own rule it denied itself the right to stay any proceedings, but made it automatic that the judgment of the Appellate Court was final and any other proceedings would have to follow in that court and the stay of mandate issued by a Justice of the Illinois Supreme Court was a nullity.

By the judgment of reversal in this cause does the Court mean to reverse the judgment of the Illinois Supreme Court in denying leave to appeal? The ruling certainly cannot apply to the "final judgment" of the Illinois Appellate Court, because the writ of certiorari was not requested to issue to said Court, nor was it ever issued to said Court. Inasmuch as this question is of paramount importance in the final disposition of this case the Court should clarify what judgment it is referring to. This requires a statement of the Court on the jurisdictional question presented. In other words, can this Court by issuing its writ of certiorari to the Illinois Supreme Court, then on reversal, issue its mandate to the Illinois Appellate Court and direct that Court what to do, when no jurisdiction over it has been acquired. We earnestly believe this Court cannot follow such a procedure under its previous holdings.

For the reasons above stated, and as previously argued in our original Brief on Merits as noted above, this Court is without jurisdiction.

Respondent, therefore, submits that this Petition for Rehearing should be granted; that the Per Curiam judgment of reversal entered herein should be set aside; and that the Writ of Certiorari herein should be dismissed.

II.

Under the Common Law and by Virtue of Section 2106 of 28 U. S. C., Federal Appellate Courts Have the Power and Duty to Review Erroneous Findings of Fact Made by a Federal Trial Court and to Remand a Cause for a New Trial, Before Another Jury, Where the Verdict of the Jury Is Erroneous.

The Per Curiam judgment of reversal entered by this Court in this cause on February 14, 1955, citing only **Lavender v. Kurn,** 327 U. S. 645, a "demurrer to the evidence" case (See: Lavender v. Kurn, 354 Mo. 196, 189 S. W. 2d 253), adds further confusion to the already confused and unsettled question as to the "new trial" principles of law which govern the scope of appellate state court review of F. E. L. A. and like Federal Act cases.

Petitioner's first question presented for review (Pet. Br. 3) is as follows:

> 1. Whether the State or Federal law governs the right of a State Appellate Court to set aside a jury's verdict in an action under the "Safety Appliance Act" (45 U. S. C. A., Secs. . . . et seq.), as being contrary to the manifest weight of the evidence?

By its Per Curiam judgment of reversal herein, citing only **Lavender v. Kurn,** 327 U. S. 645, **actually a directed verdict case,** this Court has apparently held that **Federal directed verdict law** controls a State Court Federal Boiler Inspection Act **new trial matter.** That this is so becomes more obvious upon a reading of the three decisions cited by this Court in the **Lavender** case on page 653 of 327 U. S., i. e., **Tiller v. Atlantic Coast Line R. Co.,** 318 U. S.

54, 87 L. ed. 610; **Bailey v. Central Vermont R. Co.**, 319 U. S. 350, 87 L. ed. 1444; **Tennant v. Peoria & P. U. R. Co.**, 329 U. S. 29, 88 L. ed. 520, for in each of these cases this Court **expressly** said it was reviewing a directed verdict ruling.

The Per Curiam judgment of this Court is, therefore, contrary to Section 2106 of 28 U. S. C., to the rules of the common law, to the prior decisions of this Court and to the teachings of Blackstone, as Respondent will briefly show.

Right to common law jury trial is given by controlling Federal or State Constitution and not by F. E. L. A. or other like Federal Act.

This Court has very properly shown great zeal in preserving to injured railroad employees their **common law** right of trial by jury to the extent that in **Bailey v. Central Vermont R. Co.**, supra, 319 U. S. 350, 353, 87 L. ed. 1444, a directed verdict case, it said:

> p. 354 of 319 U. S., p. 1448 of 87 L. ed.: "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York, 315 U. S. 752, 86 L. ed. 1166, 62 S. Ct. 854. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act."

It is to be noted that **Jacob v. New York**, cited supra, 315 U. S. 752, 86 L. ed. 1166, a Jones Act case, **relies upon the Seventh Amendment**, which guarantees a jury trial according to the rules of the common law.

However, the defendant railroads have the same right to a jury trial **according to the rules of the common law.** And, according to Blackstone (3 Blackstone's Commentaries, p. 387, 3 Lewis's Ed., p. 1347), one of the rules of the common law provided for the granting of a new trial "if it appears by the judge's report, certified by the Court,

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that the jury have brought in a verdict **without or contrary to the evidence**" . . . (Emphasis supplied.)

At the common law, new trials were first granted **only in the courts of review**, for, at an early date in the development of such common law, the courts ("Common Pleas" and "King's Bench") were centered at Westminster and suit was filed there and then sent to the County where it arose, for trial. The King commissioned one of the judges of the Courts at Westminster to try the case and these trial courts were known as courts of "assize" and "nisi prius." After the trial the "nisi prius" judge returned the record, verdict and proceedings, in the form of a "postea" (entered on the back of the record) to the court at Westminster. The record was then reviewed "en banc" at Westminster and judgment was there entered. **Motions for new trial were made to the court** ("en banc") **at Westminster** (Corcoran v. City of Chicago, 373 Ill. 567, 575-576).

"The exercise of these superintendent powers of the king's courts, in setting aside the verdict of a jury and granting a new trial, on account of misbehavior in the jurors, is of a date extremely ancient. There are instances, in the year books of the reigns of Edward III, Henry IV, and Henry VII. . . . And upon these the chief justice Glynn, in 1665, grounded the first precedent that is reported in our books (Styl. 466) for granting a new trial on account of **excessive damages**" (3 Blackstone's Commentaries, pp. 387, 388—3 Lewis's Ed., p. 1347).

Writ of error for "matter of **law** arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; there being no method of reversing an error in the determination of **facts**, but by an attaint, or a new trial, to correct the mistakes of the former verdict" (3 Blackstone's Commentaries, pp. 406, 407—3 Lewis's Ed., p. 1363) was had from the court of "Common Pleas" at Westminster and from the "King's Bench in

Ireland" to the "King's Bench" in England and the cause was then removable by writ of error to the "House of Lords" (3 Blackstone's Commentaries, p. 411—3 Lewis's Ed., p. 1367).

Blackstone further says "that if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, the party may have relief **in the court above**, by obtaining a new trial" (3 Blackstone's Commentaries, p. 387—3 Lewis's Ed., p. 1346); and that (3 Blackstone's Commentaries, pp. 390, 391—3 Lewis's Ed., pp. 1349, 1350):

> p. 1349—"If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing, which might be reviewed in a course of appeal."
>
> p. 1349—"Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust, and abhor a tribunal which he imagined had done him an injury without a possibility of redress.
>
> "Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though

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contrary to the first, imports no tittle of blame upon the former jury, who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject: and nothing is now tried but the real merits of the case."

ee also (cited on page 23 of Respondent's Brief on lerits):

Illinois decisions:

Corcoran v. City of Chicago, 373 Ill. 567, 575-580, 27 N. E. 2d 451, appeal dismissed 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed. 473—reviews common law authorities, cites and quotes (pp. 577-578) **Bright v. Eynon** (King's Bench, 1757), 1 Burrows, 391 and cites (p. 580) **Smith v. Times Publishing Co.**, 178 Pa. St. 481, 36 Atl. 297;

Olson v. Chicago Transit Authority, 1 Ill. 2d 83, 85, 86.

Federal decisions:

Aetna Casualty & Surety Co. v. Yeatts (4 Cir., 1941), 122 F. 2d 350, 352-354 (Parker, J.) citing Felton v. Spiro (6 Cir.), 78 F. 576;

Virginian Ry. Co. v. Armentrout (4 Cir., 1948), 166 F. 2d 400, 408 (Parker, J.);

Garrison v. United States (4 Cir., 1932), 62 F. 2d 41, 42 citing: **Felton v. Spiro** (C. C. A. 6th), 78 F. 576; Mt. Adams & E. P. Inclined R. Co. v. Lowery (C. C. A. 6th), 74 F. 463;

Felton v. Spiro (6 Cir., 1897), 78 F. 576;

Mt. Adams & E. P. Inclined R. Co. v. Lowery, 6 Cir., 1896, 74 F. 463, 465-477, **Lurton, J.**

The antipathy of trial court juries toward railroad orporations is matter of common knowledge and, in the

ordinary F. E. L. A. jury trial, the only common law rule and right of real beneft to such a corporation is its right to a new trial if the verdict of the jury is against the manifest or clear weight of the evidence, or is excessive, or, for any other reason, is unjust.

The Per Curiam judgment of this Court in this cause wrongfully denies Respondent this valuable common law right, even though the Seventh Amendment does not apply to this state court Federal Boiler Inspection Act cause (Pearson v. Yewdall, 95 US 294, 296, 24 L. ed. 436, 437; Minneapolis & St. L. R. Co. v. Bombolis, 241 US 211, 217, 60 L. ed. 961, 963; Brady v. Southern R. Co., 320 US 476, 479, 88 L. ed. 239, 242), even though this court has held that state courts shall administer such cases "in accordance with the modes of procedure prevailing in such [state] courts" (Minneapolis & St. L. R. Co. v. Bombolis, 241 US 211, 218, 60 L. ed. 961, 963, 964) and even though it has promulgated Rule 59, Fed. Rules Civil Procedure, which treats new trials in the Federal Courts **as a procedural matter.**

Moreover, such Per Curiam judgment is directly contrary to said Section 2106 of 28 U. S. C., which confers even greater powers of review on the Federal Appellate Courts than is conferred on the Illinois Appellate Courts by Section 92 (3) (b) of the Illinois Civil Practice Act [Ill. Rev. Stat. 1953, Ch. 110, par. 216 (3) (b)—**partially** quoted at page 6 of Respondent's Brief on Merits].

The controlling effect and meaning of said Section 2106 is eloquently and clearly stated by Judge Edwin R. Holmes of the 5th Circuit in his two dissenting opinions (concurred in by Judge Leon McCord) in **Sunray Oil Corporation v. Allbritton**, reported in 187 F. 2d 475 and in 188 F. 2d 751, both cited at page 54 of Respondent's Brief on Merits.

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Since the Per Curiam judgment of this Court in this ause shows that it has entirely misapprehended and verlooked the real issue under discussion, i. e., the right f an appellate court to remand a cause for a new trial, y its application of Federal directed verdict law to this ew trial cause, and as a convenience to this Court, Re-pondent will briefly discuss such two dissenting opinions.

In his first dissenting opinion in the **Sunray Oil** case, upra, 187 F. 2d 475, Judge Holmes points out (page 78) that under Section 22 of the Judiciary Act of 1789* **See**: 28 U. S. C. (1941 Ed.) 879] "No reversal upon writ f error was permissible in the Supreme Court for any error of fact;" that when writs of error were abolished 28 U. S. C. (1941 Ed.) 861a, 861b]* and appeals sub-tituted therefor, it was expressly provided that appeals hould be subject to the same rules, regulations and re-trictions, as were previously prescribed in law in cases f writ of error [Title 28 U. S. C. (1941 Ed.) 880);* and hat this statutory limitation on federal appellate power was repealed in 1948 (Ch. 646, § 39—"Schedule of Laws Repealed" 62 Stat. 992).

In his second dissenting opinion in the **Sunray Oil** case, supra, 188 F. 2d 751, Judge Holmes first quoted the **Pepper** case, 5 Cir. 1951, 187 F. 2d 71 (quoted page 53 of Respondent's Brief on Merits) and the **Armentrout** case, supra, 4 Cir. 1948, 166 F. 2d 400 (quoted pages 51-53 of Respondent's Brief on Merits) and pointed out that at the common law the appellate King's Bench re-examined the facts, directly and then said:

> p. 753—"By Sec. 22 of the Judiciary Act of 1789,* federal appellate courts were forbidden to do this; but by Sec. 2106 of the Judiciary Code of 1948, 28 U. S. C. A. they were required to do it, since the 7th Amendment impliedly authorizes the re-examination

* Quoted in Appendix.

of any fact tried by a jury except otherwise than in accordance with the rules of the common law. The procedure of striking at the jurors' misbehavior over the shoulders of the trial judge was devised to prevent injustice because of the statutory restriction on appellate power. The old statute having been superseded, the reason for the devise has ceased." . . .

p. 755—"The statutory provision against reversals in jury cases for any error in fact remained on the books for 159 years; and, during that period, the federal courts lost the use of an ancient common-law appellate power. This power, in our opinion, may be compared to an arm that has become atrophied; even legislation like said Sec. 2106 cannot fully restore it; only a decision of the Supreme Court can cure it completely." . . .

p. 756—"Under Section 2106 of New Title 28, U. S. Code, what was said by the Supreme Court in Capital Traction Co. v. Hof, 174 U. S. 1, 13, 19 S. Ct. 580, 585, 43 L. Ed. 873, with reference to the power of trial courts to set aside verdicts and grant new trials, now applies to appellate federal Courts [i. e., the power 'to set aside their (jury) verdict, if . . . it is against the law **or the evidence**' (emphasis supplied)].

. . . So far as they affected jury trials, six little words in the Judiciary Act of 1789[1] (Footnote 1. 'Or for any error in fact.' 28 U. S. C. 879, R. S. 1011, 18 stat. 318) survived the vicissitudes of many legislative changes, and for over a century and a half escaped the sickle of revisors, codifiers, rule makers, but finally they succumbed to the deft touch of the 1948 codifiers in their 'Schedule of Laws Repealed': and all the king's horses and all the king's men cannot put them back again in their little niche without an Act of Congress; but the Seventh Amendment remains intact, and champions of the jury system have

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nothing to fear if the federal courts will adhere to the essential principles of trial by jury at common law, in 1791, as required by said Amendment."

Having in mind that **Garrison v. United States**, supra, 4 Cir., 1932, 62 F. 2d 41, is the first of Chief Judge Parker's opinions* pointing out the distinction between the powers of the court, as to weighing the evidence and judging the credibility of witnesses, in passing upon a motion for directed verdict or for judgment n. o. v. and in passing upon a motion for a new trial, the attention of this court is invited to the majority and minority opinions of this court in **Galloway v. United States**, 319 U. S. 372, 87 L. ed. 1458, rehearing denied, 320 U. S. 214, 87 L. ed. 1851.

In that case the majority of this Court, in affirming a directed verdict in favor of the United States, in a suit upon a policy of War Risk Insurance, speaking through the late Mr. Justice Rutledge, said:

p. 390 of 319 U. S., p. 1470 of 87 L. ed.:

> . . . "The jury was not absolute master of fact in 1791. Then as now courts excluded evidence for irrelevancy and relevant proof for other reasons. The argument concedes they weighed the evidence, not only piecemeal but in toto for submission to the jury, by at least two procedures, the demurrer to the evidence and the motion for a new trial."

The minority opinion by Mr. Justice Black, with whom Mr. Justices Douglas and Murphy concurred, states:

p. 411 of 319 U. S., p. 1482 of 87 L. ed.:

> . . . "If, as the Court believes, insufficient evidence has been offered to sustain a jury verdict for the petitioner, we should at least authorize a new trial. Cf.

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* See: Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350, 352, 353; Virginian Ry. Co. v. Armentrout, 166 F. 2d 400, 408, 409; Snead v. New York Central Railroad Company, 216 F. 2d 169.

Garrison v. United States (C. C. A., 4th), 62 F. 2d 41, 42.

It is, therefore, apparent that at least two of the present members of this Court have been of the opinion that **this Court** has the power to "authorize a new trial" where "insufficient evidence has been offered to sustain a jury verdict for the petitioner." This is, of course, the contention here made by Respondent that has been overlooked by this Court.

At pages 5 and 6 of his Reply Brief on Certiorari and at page 2 of his Reply Brief on Merits the Petitioner herein argues that F. E. L. A., Federal Boiler Inspection Act and Federal Safety Appliance Act cases, are **above and not subject in any way to** the regular Federal rules relating to the granting of new trials in other types of cases tried before juries in the Federal Courts. And at page 6 of his Reply Brief on Certiorari he says:

> "True, in other types of cases, such liberty is allowed and respondent has cited some of these. In fact, at page 13, it cites the case of Charles v. Norfolk and Western Ry. Co., 188 F. 2nd 691, which by virtue of its title might be inferred to be an action under the act. However, upon reading this case it is found it involves an action by a negro passenger for assault and battery, etc., against the railway."

The Per Curiam judgment of this court in this cause perhaps indicates that this court agrees with this novel and astonishing argument. If this court does agree with this "double standard" contention and argument, and is so holding in this cause, Respondent respectfully submits that, in fairness to Respondent and to the Illinois Appellate Court that heard this cause, and as a service to the Bench and Bar of this Country, it should give its reasons in a formal written opinion. If injured railroad employees are in a special category, above, beyond and not subject

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in any way to, the new trial rules governing all other litigants, this court should so state, so that the Congress, the Bench and Bar and the defendant railroads will know the true situation.

If, on the other hand, this Court sees fit to heed the teachings of Blackstone and elects to abide by and follow said section 2106 of 28 U. S. C., it will grant a rehearing in this cause and affirm the judgment of the Illinois Appellate Court. In so doing this Court will restore "an ancient common-law power" to itself and to the Appellate Courts, for as said by Judge Holmes in the **Sunray Oil** case, supra, 188 F. 2d 751, 755—"even legislation like said Sec. 2106 cannot fully restore it; only a decision of the Supreme Court can cure it completely."

Respondent further invites the attention of this court to the plight of the Illinois Appellate Court that heard this cause, for this particular Illinois Appellate Court hears appeals from Madison and St. Clair and nearby Counties, an industrial area in Illinois second only to Chicago and Cook County, and reviews many F. E. L. A. and like Federal Act cases.

Petitioner concedes (p. 12, Pet. Brief on Merits) that the Illinois Appellate Court had the power to remand for a new trial under Illinois law. This Court has reversed the Illinois judgment, citing only **Lavender v. Kurn**, 327 U. S. 645, a 1945 directed verdict case, in the face of the clear fact that Section 2106 of 28 U. S. C., enacted three years later (1948), gives Federal Appellate Courts like powers of review and remandment.

Certainly this and the other Illinois Appellate Courts, as well as the Appellate Courts of the other states, are entitled to a formal opinion which will clear the atmosphere and fully, correctly and accurately inform them of their "new trial" powers and duties in reviewing F. E. L. A. and like Federal Act cases.

In **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U. S. 474, 77 L. ed. 439, this Court in explaining its rule that it "will not review the action of a federal trial court in granting a motion for a new trial for error of fact" said:

pp. 481-482 of 287 U. S., pp. 443-444 of 77 L. ed.:

"The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. **Its early formulation by this Court was influenced by the mandate of the Judiciary Act of 1789, which provided in § 22** that there should be 'no reversal in either [circuit or Supreme] court on such writ of error . . . **for any error in fact.**" Sometimes the rule has been rested on that part of the Seventh Amendment which provides that 'no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' More frequently the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court.

"It has been suggested that a review must be denied because of the historical limitation of the writ of error to matters within the record, of which the motion for a new trial was not a part. Compare Judge Learned Hand in Miller v. Maryland Casualty Co. (C. C. A. 2d), 40 F. (2d) 463. But the denial of review can no longer rest upon this ground, since the record before the appellate court has been enlarged to include in the bill of exceptions a motion for a new

trial, made either before or after judgment. Compare Harrison v. United States (C. C. A. 2d), 7 F. (2d) 259, 262. Under certain circumstances the appellate court may enquire into the action of the trial court on a motion for a new trial." (Emphasis supplied.)

Section 22 of the Judiciary Act of 1789 was repealed in 1948 (Ch. 646, § 39—"Schedule of Laws Repealed"—62 Stat., p. 992), as Judge Holmes points out in his second **Sunray Oil** case opinion, supra, 188 F. 2d at 756, and such statutory prohibition against reviewing "error of fact" **no longer exists.** The historical "procedural" limitation of writ of error, of which the motion for a new trial was not a part, no longer bars review (Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 482, 77 L. ed. 439, 444; Southern Pac. Co. v. Gutherie, 9 Cir., 1949, 180 F. 2d 295, 303-306, certiorari denied, 341 U. S. 904; Bucher v. Krause, 7 Cir., 1953, 200 F. 2d 576, 585-587, certiorari denied, 345 U. S. 997, rehearing denied, 346 U. S. 842). This Court has squarely held that the denial of a new trial is reviewable "for a plain abuse of—discretion" (United States v. Socony Vacuum Oil Co., 310 U. S. 150, 247, 248, 84 L. ed. 1129, 1180, 1181) or "when the findings of fact are wholly unsupported by evidence" (United States v. Johnson, 327 U. S. 106, 111, 112, 90 L. ed. 562, 565, 566).

Respondent, therefore, respectfully refers this Court to pages 45-59 of its Brief on Merits and submits that under the authorities there cited, under Section 2106 of 28 U. S. C. and under **the true rules of the common law,** this Court has the clear duty to sustain the right and duty of Appellate Courts to remand for a new trial, where the verdict of the jury is against the clear or manifest weight of the evidence, or where justice so requires.

For the foregoing reasons Respondent submits that this Petition for Rehearing should be granted; and that on such Rehearing the writ of certiorari herein should be

dismissed or, in the alternative, that the now final judgment of the Illinois Appellate Court should be affirmed.

Respectfully submitted,

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Certificate.

I, Fred P. Schuman, an attorney of the Bar of the Supreme Court of the United States, hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay.

Granite City, Illinois, March ...., 1955.

.....

Fred P. Schuman,
1308a Niedringhaus Avenue,
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APPENDIX.

28 U. S. C. (1941 Ed.), Section 861a, 861b, 879 and 880 read as follows:

861a. Writ of error abolished; substitution of appeal.

The writ of error in cases, civil and criminal, is abolished. All relief which prior to January 31, 1928, could be obtained by writ of error shall hereafter be obtainable by appeal. (Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54.)

861b. Statutes governing writs of error to apply to appeals.

The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error. (Jan. 31, 1928, ch. 14, § 2, 45 Stat. 54; Apr. 26, 1928, ch. 440, 45 Stat. 466.)

879. Reversal on former error limited.

There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact. (R. S. § 1011; Feb. 18, 1875, ch. 80, § 1, 18 Stat. 318.)

"Derivation

Acts Sept. 24, 1789, Ch. 20, § 22, 1 Stat. 84; Mar. 2, 1803, Ch. 40, § 2, 2 Stat. 244.

Writs of Error Abolished

Writs of error were abolished and appeal substituted therefor by sections 861a and 861b of this title"

880. Appeals from district courts; applicability of same rules, etc, as writs of error.

Appeals from district courts shall be subject to the same rules, regulations, and restrictions as were prior to January 31, 1928, prescribed in law in cases of writs of error. (R. S., § 1012; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167.)